develop any standards necessary for permitting local competition into their rural areas. As the Citizens Utilities Company explains, "Section 251(f) issues involve factual issues that will probably be unique in each case It will be exceedingly difficult to formulate standards that can contemplate the myriad of different fact situations that the states may be called upon to address."[48] Similarly, Pacific Telesis Group concludes that the states "obviously provide the best fora for considering local conditions affecting competitive opportunities, and their discretion should not be prematurely constrained by the Commission."[49] Should the Commission nevertheless determine to adopt guidance, it should be in the form of recommendations for states to adopt as they see fit and consistent with the Act.

B. The Commission Must Reject Proposed Guidelines Which Are Inconsistent With the Act.

A few commenters propose standards which would preclude the states from utilizing Section 251(f) for its intended purpose of preventing negative impacts on consumers from competition in the areas of small and rural telephone companies.[50] These commenters substitute a few key words of their own for the actual language of the Act and then interpret it in ways that far exceed the boundaries of reasonableness and logical intent. In all instances, these commenters provide little if any support for their arguments.

General Communication, Inc. suggests that the FCC clarify in national guidelines that exemptions and modifications must be limited to "timing issues."[51] This recommendation has no

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[48] Citizens Utilities Company at 34-35.

[49] Pacific Telesis Group at 99.

[50] National Cable Television Association, Inc. at 63-67; General Communication, Inc. at 16-19; Small Cable Business Association at 14-21.

[51] GCI at 19.

basis in the law and, not surprisingly, GCI is unable to support it. Section 251(f)(1)(A) is clear that a rural telephone company is indefinitely exempt from the requirements of Section 251(c) until a carrier receives a bona fide request for interconnection or network elements and the state is able to make all three of the following determinations: (i) the request is not unduly economically burdensome, (ii) the request is technically feasible, and (iii) the request is consistent with Section 254 (the universal service provisions of the Act).

Section 251(f)(2) of the Act allows a carrier with fewer than two percent of the nation's subscriber lines to petition its state for a suspension or modification of the requirements of Section 251(b) or (c). While a suspension admittedly refers to a temporary canceling, a modification refers to changing the interconnection requirements.[52] Southern New England Telephone Company recognizes the distinct difference between these two terms when it states that "clearly, Congress would not have stated that public utility commissions have power to provide either for "suspension" or "modification" if it had intended those two words to have the same meaning.....the authority to grant a "modification" gives the public utility commission broad discretion to change the nature of any requirement imposed by sections (b) and (c) in some substantive way."[53] Thus, GCI's attempt to reduce exemptions and modifications to "timing issues" is without merit and should be ignored by the Commission.

Similar to GCI's efforts to eviscerate Section 251(f), the National Cable Television Association (NCTA) suggests that once a rural incumbent LEC receives a bona fide request for interconnection, termination of the rural exemption is presumed to be appropriate except in

[52] *See MCI v. AT&T,* 114 S.Ct. 2223, 2229-30 (1994).

[53] Southern New England Telephone Company at 36-37.

certain limited circumstances.[54] Once again, this is a hollow assertion. It makes no sense to believe that Congress would have established an automatic exemption for rural LECs (with no less than a three-part state determination required before it may be terminated) if it was intended to be terminated in all but limited circumstances. If this were the case, Congress would not have established the rural exemption, and would only have included the suspensions and modifications provisions in which the carrier must actively petition the state for their approval. The fact of the matter is, Congress recognized that the dynamics of small LECs serving rural America are far different than those that affect large LECs serving urban areas, and that untempered competition in many cases might not be in the public interest.

NCTA and GCI misrepresent the actual language of Section 251(f) in their attempts to argue it away. When paraphrasing the suspensions and modifications language of Section 251(f)(2), both NCTA and GCI subtly alter key words of the subsection. In their version, suspension or modification could or may be granted only if it is necessary to avoid the three enumerated circumstances: (i) a significant adverse economic impact on users of telecommunications service; (ii) an unduly economically burdensome requirement; and (iii) a technically infeasible requirement.[55] By using the underlined words in place of the actual language, NCTA and GCI try to imply that all three of these criterion must be met in order for a state to grant a suspension or modification, and even then, the state has the option not to grant the petition. This is a blatant perversion of the Act's language. Section 251(f)(2) states that:

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[54] NCTA at 66.

[55] NCTA at 64; GCI at 17. NCTA substitutes "waiver" for suspension or modification, but the standards for grant of the latter are not the traditional ones for waiver, but are specified in the Act.

The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification--

(A) is necessary-

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

(emphasis added)

Thus, the use of the words "shall" and "or" establish that a State commission need only find that one of the three circumstances under (A) would occur without the requested suspension or modification and it is required to grant the carrier's petition so long as it is consistent with the public interest, convenience, and necessity.

NCTA also suggests that because Section 251 already incorporates a "technical infeasibility" standard into its key interconnection requirements, suspensions and modifications sought on this basis should be rare.[56] This argument contains the same backwards logic as NCTA's argument for near-automatic termination of the rural exemption. If Congress believed that the other technical infeasibility standards of Section 251 would sufficiently recognize the inherent differences of rural telephone companies and their service areas, it would not have included it again as a criterion for states to consider when evaluating petitions for suspensions and modifications. As the Southern New England Telephone Company correctly explains, "Congress would not have provided for an exemption or modification in Section 251(f) based on technical infeasibility unless it had intended the term "technical infeasibility" as used there to be defined

[56] NCTA at 64, n. 219

differently than the term as used in subsections (b) and (c)."[57] Just the opposite of NCTA's claim, by including the technical infeasibility clause again in Section 251(f), Congress intended the standard used in a state's determination of technical infeasibility under that section to be less stringent than the standard used under Sections 251(b) or (c).

In its overzealous efforts to "remove the barriers to entry for small cable," the Small Cable Business Association ("SCBA") recommends that the FCC adopt national standards to govern state application of the rural LEC exemption. It contends that "the Commission has the authority under Section 253 to eliminate such barriers."[58] The RTC assumes that the SCBA is referring to Section 253(a) which states that

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

The SCBA refers to this provision in a strained attempt to justify Commission standards that would undermine the authority the Act gives to the states to protect the public interest in rural areas and to suggest that the Act's only goal is competition, with no recognition or concern for its impact on rural LECs and their customers. However, SCBA conveniently makes no reference to Section 253(b) which significantly qualifies 253(a). Section 253(b) states that:

> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with Section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

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[57] Southern New England Telephone Company at 35-36.

[58] SCBA at 14-15.

Section 253(b) illuminates the concern Congress had regarding the impact of unfettered competition on consumers and small LECs in rural areas and reaffirms the intent of Section 251(f). The filing of Bay Springs Telephone Company, *et. al.* astutely interprets the language of Section 253 (a) and (b) when it states that:

> . . . despite the general prohibition against state regulations that act as barriers to entry, states commissions should exercise their jurisdiction to guard other values, including universal service, public safety, service quality, and consumer protection... Taken together, these provisions reveal Congress's clear intent that the mantra of competition not lull regulators into a stupor from which other, equally valid public interest concerns cannot be given their proper weight."[59]

The United States Telephone Association (USTA), while recognizing and respecting the deference given to states under Section 251(f), nonetheless offers national guidelines to aid states in their determinations to terminate the rural LEC exemption and approve suspensions and modifications.[60] These guidelines would create baseline definitions for the key terms used in Section 251(f) (such as bona fide request, adverse economic impact, unduly economically burdensome, and technically infeasible), which the states could expand upon as they saw fit. The RTC continues to believe that the states are in the best position to establish these definitions. Nonetheless, to the extent that the FCC decides to promulgate guidelines as recommendations for the states, the RTC is supportive of those offered by USTA.

In particular, USTA's guidelines for a bona fide request would ensure that all requests for interconnection are specific, in good faith, and that the LEC will be able to recover any investment and expense required to fulfill the request.[61] These basic elements to a bona fide

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[59] Joint Comments of Bay Springs Telephone Company, Inc., *et al.*, at 8-9.

[60] USTA at 86-93.

[61] USTA at 87-88.

request definition are particularly relevant in light of AT&T's vague, standardized letter to State commissions requesting interconnection with all incumbent LECs in each state. As U S West explains, AT&T "simply proclaims as a matter of right to be able to demand immediate availability of a wide array of interconnection points and network elements, without any type of commitment (or even information) as to whether it will purchase any of these facilities or services if they are made available in any particular location."[62] This certainly is not what Congress intended by a bona fide request and State commissions must not consider it as such. USTA supports this view by duly noting that, "Section 251(f) applies only to a state's determination of a specific company's exemption weighed against the merits of a bona fide request it has received. Statewide elimination of exemptions for all companies is inconsistent with this legislative language and, to the extent such measures have been enacted, they cannot be allowed to stand."[63]

By including Section 251(f) in the 1996 Act, "Congress acknowledged significant differences in size, financial ability, resources and economies of scope and scale"[64] between rural LECs and large LECs. Furthermore, while the overall goal of the 1996 Act is undoubtedly to create competition for the provision of local loop services, the Act also makes clear that this goal is a means to an end and not an end in itself. It is incumbent upon state commissions to use their authority under Section 251(f) in a manner that is consistent with its purpose to protect the public interest in rural areas. Likewise, any guidelines the FCC may decide to establish to assist the states must compliment this objective.

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[62] U S West at 41, n. [illegible]0.

[63] USTA at 86-87.

[64] USTA at 88.

V. INCREMENTAL PRICING OF INTERCONNECTION WILL NOT SATISFY THE REQUIREMENTS OF THE ACT.

The RTC, in its comments, explained that forward-looking long-run incremental cost ("LRIC") methods are only one analytical tool among other necessary considerations. The bottom line concern about incremental pricing proposals is that they would impose constraints that would cause LECs to fall short of total cost recovery. Such constraints would not satisfy the Act's requirement for nondiscriminatory pricing or allow a reasonable profit for providers. The cost recovery constraint would hinder commitment to network expansion and upgrades, particularly for those designated as "Eligible Telecommunications Carriers."[65]

The problem with LRIC and other extensions of LRIC theory is the recovery of shared, joint and common costs when costs are considered for individual services or network elements provided by a multi-element or multi-services provider.[66] Incumbent carriers, and more critically the highest cost rural LECs, are faced with recovery of the embedded costs already incurred to serve their regulatory obligations and must continue to recover costs as they are committed to

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[65] "Guarding against cross-subsidy and predatory pricing is the primary function of the incremental cost studies." *Fifteenth Supplemental Order*, Docket No. UT-950200, released by the Washington Utilities and Transportation Commission on April 11, 1996 ("*WUTC Order*") at p. 81. "No party has suggested any sort of mechanistic relationship between incremental costs and rates. . . . Neither are rates based on equal markup over incremental cost necessarily fair. An equally 'fair' rule, with potentially very different rates, would be to have equal discounts from the stand-alone cost of each service." *Id.* "Other considerations . . . remain an important part of the rate-setting process. *Id.* at 82 "1. Effectiveness in yielding total revenue requirements under the fair return standard; 2. Fairness in the apportionment of total costs of service among different consumers; and 3. Efficiency in discouraging wasteful use of services while promoting all justified types and amounts of use, in view of the relationships between costs incurred and benefits received. *Id.* at n. 42. These considerations are more consistent with the overall requirements of the Act than any of the LRIC proposals. *See also* SBC Communications Inc. at 91.

[66] "Pricing at LRIC or [total service] LRIC in the presence of common costs and scale/scope economies results in a revenue shortfall. Mandated pricing at those levels is noncompensatory." GTE, Attachment 3, Affidavit of Edward C. Beauvais, Ph.D., at 12.

provide supported services under the new universal service provisions.[67] LECs have real costs which must be addressed beyond that which can be determined under incremental analysis including plant that has been inadequately depreciated under the former regulatory environment, the cost of maintaining their no market-exit carrier-of-last-resort status, the greater cost imposed on them as the result of asymmetrical regulation, the cost of guaranteeing capacity to the public as a last resort to back up new entrants, and overall universal service requirements. The majority of the comments of those cognizant of the cost characteristics of LECs and the requirements of the Act reiterate these same concerns and observations.

Much of the incremental costing and pricing theory discussed by commenting parties was developed in an academic environment to explain the general conditions -- the relationship between cost and price -- that providers in a competitive marketplace would be forced to exhibit. Use of this theory to determine the conditions that government should create through regulation to achieve competitive marketplace conditions is an entirely different matter. The very existence of regulation distorts the dynamic forces purportedly described by the theory. Government regulation does not possess the wisdom to replicate what the market achieves.

Incremental costing and pricing at the margin are pure concepts that only describe one of the limits that real world competitive markets are presumed to follow. Product manufacturers and service providers price services or products at the margin only if they are capable of recovering

[67] SBC Communications summarizes the LEC position with respect to the merits of forward-looking incremental cost pricing: "There is no basis for concluding that the Act's definition of cost is restricted to forward-looking incremental costs. Section 251(d)(1) refers to cost without restricting the term in that fashion. In fact, adopting such a restriction would be in conflict with Section 252(d)(1)(B), which permits regulators to allow a reasonable profit. . . . Therefore, rates restricted to incremental costs are inconsistent with the Act. SBC Communications Inc. at 88, footnote omitted and at 89-90.

costs in excess of the incremental somewhere else, are prepared to suffer losses for the firm, or can eliminate all non-incremental costs. Producers or providers of multiple products or services will elect to recover costs in excess of incremental across their product or services mix after considering a complex set of conditions including cost, price, the value of specific services or products to consumers and users, the resulting demand at different prices, and the actions of other similar competitors.[68] The common sense point to this discussion is that costs will be recovered in excess of those identified as incremental (or the firm will experience losses), and the manner in which this occurs is the product of a large number of interactions among users and providers that eventually reach a range of equilibrium. Regulation cannot be expected to reach the same equilibrium. Also intuitive to this discussion, rigid costing and pricing rules would not duplicate such a dynamically complex and fluid result.

Price regulation, if appropriate at all, should be confined to the more clear outer bounds of reasonableness. Pricing rules should be confined to the prescription of broad parameters at the boundaries where intervention is least likely to result in distortion and harm or a departure from the desired result. The Commission should confine rules, if any at all, to only a minimum and maximum range of prices.[69] Even this minimal, but rigid, determination will be difficult to apply

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[68] MFS describes this as "driven by the objectives and elasticities of demand as perceived by the individual competitors." MFS at 55.

[69] SBC Communications Inc. describes this as the presumption of lawfulness for prices that fall within a "zone of reasonableness" between an established price floor and a price ceiling. SBC Communications Inc. at 93. SBC goes to state that LRIC could serve as the price floor and current rates could be used for the ceiling. Id. at 94. Others have suggested that other incremental costing results could serve as the floor and stand-alone cost could serve as the ceiling. See RTC at 29-30. USTA agrees that in some instances LRIC could be used as a floor. USTA at 44-45.

to the smaller and more rural LECs, if not impossible, without other harmful consequences, and therefore should be avoided.

For smaller and rural LECs, the regulatory oversight should be focused more on whether, from an overall reasonable standpoint, prices permit the LEC to recover its costs including all joint and common costs.[70] "Eligible Telecommunications Carriers" cannot confine their expenditures and network investments (or overlook their embedded costs) to only those that they may be allowed to recover under some sort of incremental cost methodology. Eligible carriers cannot yet trust that all of their non-incremental costs incurred to support the Section 254 universal service goals will be recovered through a new funding mechanism. Nor can they exit the market should the combination of both set of rules yield an inadequate answer. It would make no sense to support an eligible carrier's costs incurred for universal service reasons and to deny the same carrier on interconnection pricing. Specific revenue sources cannot be isolated for eligible carriers' policy considerations. Eligible carriers, and particularly the smallest ones, require an integrated approach to relative revenue, cost recovery, and pricing that preserves a rational and beneficial recovery of total costs across all service, network, and support elements.[71]

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[70] The RTC agrees with Ameritech's description that the full complement of costs should include incremental, joint, common, and residual costs including those that remain from the "legacy" of regulation. Ameritech at 59-71. Ameritech also observes that the efficient component pricing rule ("ECPR") accomplishes the goals of recovering all costs and keeping all rates affordable and "is the approach that most closely parallels the method that a firm in a competitive market would employ when faced with the opportunity of selling inputs to firms that intend to compete with it in its final product market." Id. at 92, footnote omitted. The RTC's comments also suggested that the Commission had not given the ECPR approach enough consideration given that it is designed to describe what appears to be the evolving local network competitive situation. RTC at 28-30.

[71] The Act's discussion of a prohibition against the use of rate-of-return or other rate-based proceeding is to limit the burdens imposed on carriers and regulators in conducting such lengthy proceedings for the purpose of pricing and not a requirement to embrace a particular

Many commenting parties discuss the so-called "total service long-run incremental cost" ("TSLRIC") concept mentioned in the NPRM.[72] The Commission has recognized that the concept is not well established. Regardless of its conceptual sense, there is little practical experience with application of the theory to an extent apparently needed if applied to interconnection pricing. Experts have difficulty describing how an incremental cost study should be performed and disagree on many of what turn out to be subjective assumptions.[73]

The comments also suggest that the concept has not been uniformly established nor does everyone have the same ideas about how it should be applied. A great deal of confusion arises over whether this new theory should be applied to individual services or physical network elements. Interconnection elements fall more squarely into the category of functional network elements than traditional service classifications. For example, Economist William Taylor speaking at a recent FCC forum reminded everyone that the acronym's "S" stands for service and wondered whether the concept is adaptable to network elements.[74] A general review of the

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economic theory. See Bell Atlantic at 37.

[72] *NPRM* at ¶¶ 124-131.

[73] MFS at 54.

[74] ". . . [A] number of parties speak of the TSLRIC of unbundled network elements. And if you remember what the S stands for in TSLRIC, that's service. . . . To apply that method to a network element says imagine the total firm with and without a particular network element. And if you can do that, that is if you can engineer the firm with and without a particular network element, you've got a reasonable study. But I can think of lots of network elements for which that exercise is ludicrous." William Taylor, speaking at the "Economics of Interconnection Panel Discussion Forum" held on May 20, 1996, Heritage Reporting Corporation at pp 21-22 (May 21, 1996).

comments indicates that many parties either direct their arguments to services or elements or leave the discussion unclear as to the application proposed.[75]

Furthermore, there is substantial disagreement over TSLRIC's conceptual sense and potential merits. For example, AT&T's experts offer TSLRIC as "a measure of *incremental* cost, not *marginal* cost. It includes *all* of the additional costs that society incurs by asking the incumbent carrier to supply the output of a network element."[76] How are parties to interpret the difference between the terms incremental and marginal, and how are carriers to calculate total societal costs? This definition could be argued to extend to RTC's and others' arguments that prices must recover all costs including opportunity, carrier-of-last-resort, asymmetrical regulation, universal service, and other costs discussed above. All of these costs get wrapped up into the impact on society. In any event, the debate over all additional costs and societal effects can be expected to be interminable.

Still other distinguished experts doubt the basic usefulness of the concept. In a recent forum discussion, Alfred Kahn observed that ". . . the basic assumption that TSLRIC from the ground up using the modern technology is indeed the price that would be achieved in competition is totally wrong."[77] The Colorado Public Utilities Commission observes from its regulatory experience that ". . . TSLRIC does not measure marginal costs and the actual implementation of the concept remains fraught with substantial shared costs and similarities to traditional LRIC

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[75] For example, Professor Nicolas Economides believes that TSLRIC reflects "the costs of supplying network component or service using present day technology." Prof. Nicolas Economides at 3.

[76] AT&T, Affidavit of Baumol, Ordover, and Willig at 8, n.3.

[77] Alfred Kahn, speaking at the "Economics of Interconnection Panel Discussion Forum" held on May 20, 1996, Heritage Reporting Corporation at p. 34 (May 21, 1996).

studies."[78] The Connecticut regulatory agency apparently has applied TSLRIC in a manner that is a combination of definitions including the more basic LRIC and averaged unit cost applications.[79]

AT&T suggests that TSLRIC pricing will be fully compensatory and claims that LECs have already conceded this observation.[80] In support of this, AT&T cites at n. 67 discussion of BellSouth and Bell Atlantic regarding TSLRIC. The cited discussion is misplaced. BellSouth simply states that the theory can be used to show that as long as revenue is above LRIC, the service in question is not being subsidized by other services. In other words, this application would be to establish the level above which a carrier must price so as to show lack of subsidy.[81] These references are to conditions which must be met for a service or element price to be found not to be subsidized by other elements or other services and to be above predatory levels. The references do not extend to any observation as to what minimum price is needed to compensate the firm fully, much less what constitutes a price including a reasonable profit.[82]

The AT&T citations are just one example among many where those who would benefit most by applying the theory turn what is meant to be a minimum floor into a "reasonable" or a maximum application.[83] The references are not relevant to the price range that a competitive

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[78] Colorado Public Utilities Commission at 35.

[79] "TSLRIC scenarios consider the total addition to output that may be experienced for a service (always something more than one) and calculates an average unit cost for each increment in the total." Connecticut Department of Public Utility Control Comments, Attachment B at p. 19.

[80] AT&T at 49 and n.67.

[81] The Bell Atlantic citation essentially makes the same observation.

[82] USTA at 38-43 and Bell Atlantic at 37-38.

[83] "We believe that the appropriate cost standard for setting a price floor for local interconnection and unbundled network elements provided by incumbent LECs to their

market, on its own, would consider, nor are they relevant to an appropriate maximum. Interexchange carriers such as AT&T and MCI simply see their short term interests best served by seeking access to unbundled LEC network elements at the lowest price because they have apparently decided against building and operating their own facilities in going after local markets. On the other side, MFS -- which actually builds local networks -- sees its short term interest as that of a competitor of unbundled network elements, and therefore wants a higher price for incumbent LECs so that its price can be set below the incumbents but still yield maximum profit above actual local costs of the network.[84]

Except for its forward-looking approach, the AT&T version of TSLRIC actually reduces to a fully distributed costing technique because AT&T claims that its method includes consideration of common and shared costs among multiple network elements.[85] If AT&T really means that LECs should be provided "with the opportunity to recover <u>all</u> of the additional costs an efficient supplier would incur . . ." to supply an unbundled network element, then it follows that its use of the term should drop the "LRIC" suffix.[86]

The theory is also applied in an arbitrary fashion that places multiple network elements and services into a hierarchy that reserves preferential treatment for some over others. Instead, a truly competitive marketplace would consider relative demand and users' valuation of services in any

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competitors is TSLRIC. However, many parties assign different meanings to the same term and this has resulted in at least two conflicting notions of TSLRIC." Florida Public Service Commission at 26.

[84] Similarly, MFS wants to perpetuate a sufficient level of local network price averaging to maintain its ability to exploit those areas (mostly urban, high-volume areas) where averaged prices are most above local network costs. MFS at 55-56.

[85] AT&T at 49.

[86] Id.

hierarchial ordering for purposes of recovering non-incremental costs. However, AT&T and others have already determined for themselves that services or elements provided in a "carrier-to-carrier" environment should enjoy the supreme position with respect to lowest incremental cost calculation and resulting price.[87]

The Commission should reject use of incremental cost methods and the imposition of rigid cost and pricing rules. The consequences will be in conflict with the overall objectives of fostering modern and advanced services and networks as well as universal service while further competition develops.

VI. TSLRIC MODEL PROPOSALS ARE NO DIFFERENT OR FURTHER DEVELOPED THAN ANY OTHER PROXY PROPOSAL.

The model that AT&T claims will make TSLRIC methods workable is no more accurate or tested than the Benchmark Costing Model ("BCM") proposed by others elsewhere in CC Docket No. 96-45.[88] The AT&T endorsed Hatfield Model uses the output of the BCM as input, and is the product of further generalized assumptions about network design and cost which potentially amplify the margin of error already suspected for the BCM. The Hatfield Model lacks proper justification and accuracy testing just as with the BCM. The authors may explain their assumptions, state that they have been constructed conservatively, and that this may lead to

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[87] For example, AT&T at 65. This argument proceeds: carrier-to-carrier pricing should receive preferential additional and incremental treatment while prices charged to the least lucrative, lowest volume end users for basic access becomes the service for which all others are additional and bear the greatest share of non-incremental cost recovery.

[88] AT&T offers the "Hatfield Model." AT&T at 51. SBC Communications Inc. shows that the BCM's loop cost calculation deviates dramatically from known quantities. SBC Communications Inc. at 93 and Appendix B.

overevaluated costs, but such observations say nothing about whether the model yields reasonable results for any single area or any single element.[89]

The Hatfield Model is doubly problematic. First, it supposedly embraces the TSLRIC concept with all the issues discussed above and disagreement over its exact application. Secondly, it also attempts to apply the concept on a proxy basis. Assuming that TSLRIC had merit, then carriers would apply the concept to actual operating areas and circumstances and their own local assumptions about network construction and cost, not by using generalized mathematical surrogates for real networks.[90]

VII. THE LEC INDUSTRY IS IN GENERAL AGREEMENT ON TECHNICAL INTERCONNECTION ISSUES.

In the initial round of comments, the RTC summarized its position with respect to the technical issues associated with interconnection such as the extent of unbundled network elements and collocation.[91] The RTC summary referenced comments to be filed by GVNW

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[89] See Reply Comments filed by the RTC on May 7, 1996, CC Docket No. 96-45 at 8-11. See also NTCA Comments filed on October 10, 1995, at 73-90, and NTCA Reply Comments filed November 9, 1995, at 26-30, both in CC Docket No. 80-286.

[90] It bears emphasizing what the proper evaluation of such models must be. The authors of recently popularized proxy models have made unsupported and unsupportable claims as to the predictive value of the mathematical models, all of which have some aspects in common. Assume that experts could agree first on what TSLRIC means and could describe the method to quantify the concept with respect to telecommunications network engineering and cost. To test a mathematical proxy, one would then need to send such a group of experts into the field, have them analyze available technology, the local service area, design a network, decide on its forward-looking cost under TSLRIC for individual network elements, calculate the answers, and then compare that expert-judged answer to what the mathematical model predicts. Only then can the value of the model be discussed. Without any more empirical evaluation of what the concept is supposed to yield, by element, by area, the public has no way of knowing whether the model has any predictive value at all. Everyone is simply forced to accept the authors' assumptions based on what is conjecture. The assumptions and predictive value need real tests.

[91] RTC at 30-33.

Inc./Management.[92] The purpose of the summary comments was to point out where the Commission's proposed approach may be overly rigid or did not take into account differences between LECs.

USTA recommends that the Commission not mandate or freeze points of interconnection in order to recognize and preserve an evolving technological network.[93] USTA also suggests, as others do, that "technically feasible" should not be carried to the "technically imaginable" or "technically possible" extremes.[94] These recommendations are consistent with the RTC's suggestions.[95]

USTA agrees that LECs should not be forced to incur cost or "take risky or unreasonable steps to construct new facilities or reconfigure their networks."[96] The RTC similarly explained that additional costs incurred to allow interconnection should be borne by interconnectors and that LECs cannot be expected to maintain excess capacity to serve the speculative demands of interconnectors.[97] USTA offers flexible criteria that should be considered in arriving at logical interconnection points.[98] This flexibility is compatible with the RTC's referenced set of "natural" interconnection points.[99] USTA also recognizes some of the differences among LECs which makes the extension of any technical feasibility of interconnection points for one LEC to another

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[92] See, generally, Comments of GVNW Inc./Management.

[93] USTA at 10.

[94] Id. at 11.

[95] RTC at 31, items 1 and 3.

[96] USTA at 11.

[97] RTC at 31-33, items 2 and 8. See also TCA, Inc. at 6.

[98] USTA at 12-13.

[99] RTC at 32, item 6, and GVNW at 17-21.

with "similar network technology" difficult.[100] USTA also offers a set of specific unbundled elements similar to those suggested by the RTC.[101] Particularly noteworthy, USTA explains why subloop unbundling should not be mandated.[102]

Other commenting parties note that interconnection technical terms must recognize differences between dissimilar LECs. The Illinois Independent Telephone Association explains that while they are "unsure of the degree of variations between states" generally, they are "very aware that technological, geographic, and demographic conditions vary widely between [incumbent LECs]."[103] The Illinois group notes some of the differences as the extent of computerized operations, the degree of attended central offices, customer density, and differences in deployed central offices.[104] The Illinois telcos go on to conclude that if interconnection standards are developed, the Commission will need a "series of standards that reflect these differences in operations."[105]

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[100] USTA at 17 and n.21. USTA warns against extending collocation requirements developed for Tier 1 LECs under the Commission's expanded interconnection proceedings to non-Tier 1 LECs. USTA at n.25. The Minnesota Independent Coalition explains that "[t]he existence of a single instance of interconnection or unbundling does not prove 'feasibility'...." and "'[t]echnical feasibility' includes both technical 'possibility' and technical 'practicality.'" Minnesota Independent Coalition at 8-9.

[101] USTA at 28-36. USTA organizes its list at a higher level than the GVNW comments but involve similar elements.

[102] USTA at 31-32 and RTC at 31-32, item 3.b.

[103] Illinois Independent Telephone Association at 1. See RTC at 31-32, items 3, 7, 8 and 11.

[104] Id. Another commenting party states that "smaller LECs . . . are concerned regarding any imposition of minimum federal standards for interconnection, or particular technical interconnection points, which may be feasible for a larger carrier or a larger serving central office, but not very applicable to them." Fred Williamson and Associates at 5-6.

[105] Id. at 2. The Minnesota Independent Coalition, noting the difference between Tier 1 and rural LECs emphasizes: "The technical sophistication, administrative capacity, and resources available to a Tier 1 LEC are completely unlike a rural LEC. Accordingly, imposing upon Tier 1

RESPONSE TO REGULATORY FLEXIBILITY ACT ANALYSIS

VIII. THE COMMISSION HAS FAILED TO MAKE A PROPER ANALYSIS UNDER THE REGULATORY FLEXIBILITY ACT.

The RTC supports the comments of the Chief Counsel for Advocacy of the United States Small Business Administration ("Chief Counsel") with respect to the Commission's analysis under the Regulatory Flexibility Act ("RFA"). Those comments were separately filed in this docket on May 16, 1996.

The Commission has incorrectly concluded that the RFA is inapplicable to the proceeding insofar as incumbent LECs are concerned (*NPRM* ¶ 275). The Chief Counsel correctly points out that the Commission's determination of who is a "small entity" in the context of this proceeding can only be made in consultation with the Small Business Administrator.[106] The Commission has, of course, not consulted the Administrator in making this determination. Instead, it has merely certified on its own that the RFA does not apply to this rulemaking proceeding insofar as it pertains to incumbent LECs on the basis of a conclusory statement that "[i]ncumbent LECs directly subject to the proposed rule amendments do not qualify as small businesses since they are dominant in their field of operation." (*NPRM* ¶ 276).

The RFA requires that the Commission treat the businesses the Small Business Administrator defines as "small business concerns" as small entities unless it consults with the Office of Advocacy of the SBA and develops another definition in accordance with notice

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LECs and rural LECs the same unbundling obligations would lead to vastly greater per unit costs for the rural LECs than for the Tier 1 LECs. Such administrative costs and burdens may outweigh the benefit to be gained from the unbundling by the rural LEC. There are undoubtedly many more examples where the burdens and costs that may be appropriate for a Tier 1 LEC would be completely out of proportion for a rural LEC." Minnesota Independent Coalition at 6-7.

[106] 5 U.S.C. § 601(3). 13 C.F.R. § 121.902.

procedures specified in the RFA.[107] Since the Commission has not developed a definition in accordance with the specified procedures, the SBA's definition in former 13 C.F.R. § 121.601 (now 13 C.F.R. § 121.201)[108] is the appropriate definition of a "small entity" for purposes of the RFA. That definition sets the eligibility criteria for the SIC codes that describe LEC business operations at fewer than 1500 employees and SBA regulations state that the definitions apply for purposes of the RFA.[109]

The Commission has also failed to follow basic principles that require reasoned decision making in concluding that incumbent LECs are dominant. In the absence of any explanation whatsoever, it is impossible to determine what the Commission means by its statement that incumbent LECs are "dominant in their field of operation" or to determine how the Commission has arrived at this conclusion. The conclusion is particularly baffling in light of this *NPRM* which proposes rules to ensure that incumbent LECs are subject to vigorous competition. In 1986, the Commission first concluded that the Regulatory Flexibility Act did not apply to incumbent LECs, no matter how small. At that time, it reasoned that every incumbent LEC, no matter how small was not a "small entity" under Section 3 of the Small Business Act because that section excluded

[107] 5 U.S.C. § 601(3) states:" the term "small business" has the same meaning as the term "small business concern" under Section 3 of the Small Business Act [15 U.S.C. §632], unless an agency, after consultation with the Office of Advocacy of the small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." The SBA established standards and defined what businesses are "small business concerns" in former 13 C.F.R. § 121.601(now included in 13 C.F.R. § 121.201).

[108] *See*, Small Business Size Regulations, 61 Fed. Reg. 3286 (January 31, 1996).

[109] 13 C.F.R. §121.902

any business that is dominant in its field of operation.[110] In a Report and Order released in 1987, the Commission simply affirmed its 1986 conclusion with the cursory statement, "[n]o argument has been advanced that would cause us to modify that determination."[111]

The RTC does not concede that the Commission was correct in 1986 or 1987. However, even if it had been, much has happened since then. The Commission is certainly aware that LECs are now facing competition from a variety of sources that include wireline and wireless carriers. The small LECS that make up RTC's membership are by no measure dominant in the field of providing exchange access in the nation. The interstate services these companies provide is de minimis in comparison to the services provided by other access providers. The Commission can no longer justify its unsupported conclusion about every incumbent LEC, particularly in light of its decision to reclassify AT&T as a nondominat interexchange carrier.[112]

The Commission should follow the recently amended procedures in the RFA as suggested by the Chief Counsel. At this stage of the proceedings, proper procedures dictate abandonment of the unsupported conclusion that all incumbent LECs are dominant and therefore not protected by the RFA. The Commission should instead use the SBA definition of a small entity. It can assume that the great majority of rural incumbent LECs have fewer than 1500 employees and are "small entities" for purposes of the RFA and make the necessary analysis under 5 U.S.C. §§ 601-

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[110] Regulation of Small Telephone Companies, *Notice of Proposed Rulemaking,* 51 Fed. Reg. 45912 (proposed December 23, 1986). The Commission incorrectly applied the "dominance" test to the local area of a small LEC's operations. The SBA, whose regulations control, considers dominance in a national context.

[111] Regulation of Small Telephone Companies, *Report and Order*, 2 FCC Rcd 3811, 3815 (1987).

[112] Motion of AT&T to be Reclassified as a Non-Dominant Carrier, *Order,* FCC 95-427, at ¶ 67. (rel. Oct 23, 1995).

612 with respect to these incumbent LECs as well as other entities. That analysis includes the items specified in ¶¶ 281-285 and significantly requires the Commission to consider significant alternatives that may minimize the impact the interconnection proposals will have on small LECs.

A thorough analysis that comports with the amended RFA will avoid unnecessary litigation and ensure consideration of the small business interest Congress recently afforded more protections. These protections now give a small entity adversely affected by final agency action the right to judicial review of agency compliance with the requirements of Sections 601, 604, 605(b) and 610 of the RFA.[113] The Commission's RFA analysis in this *NPRM* calls into question the proper definition of a "small entity " under Section 601 and would be subject to judicial review under recent amendments.

For the above stated reasons, the RTC urges the Commission to apply the RFA analysis to incumbent LECs that make up its membership.

IX. CONCLUSION

For legal, public policy, common sense and practicality, the Commission should reverse the direction in its *NPRM* and adopt only such rules as are required by the 1996 Telecommunications Act. The Rural Telephone Coalition Reply Comments have shown that the detailed nationwide approach is neither required, consistent with the Act, nor required to realize its competitive objectives. Nor should the Commission accept the proposals to broaden the scope of Sections 251 and 252 by applying them to access service provided to interexchange carriers, or to EAS and other contracts between non-competing LECs. Pricing rules, if adopted, must ensure LECs the opportunity to recover all of their costs, including joint and common costs, or risk

[113] Section 242 of Small Business Growth and Fairness Act of 1996, Pub. L. 104-121 (Approved March 29, 1996).

confiscation of their property. The various proponents of TSLRIC have neither shown how it can accomplish this objective, nor can any consensus be found among the proponents as to exactly what the TSLRIC *theory* is, much less has any specific proposal been advanced which could actually be implemented. The LEC industry is in general agreement on technical interconnection issues, specifically that substantiated differences exist between large and small LECs. Finally, the RTC shows that the Commission is in error in its conclusion that the Regulatory Flexibility Act is inapplicable to small incumbent LECs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gail C. Malloy, certify that a copy of the foregoing Reply Comments of the National Telephone Cooperative Association in CC Docket No. 96-98 re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 - General Interconnection Rules and Regulatory Flexibility Act Analysis was served on this 30th day of May 1996, by first-class, U.S. Mail, postage prepaid, to the following persons on the attached list:

Gail Malloy

Gail C. Malloy